CASE NO. 12-3114

IN THE UNITED STATES COURT Of APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Appellee

-vs-

VERA DEMJANJUK, as Executrix of the
ESTATE OF JOHN DEMJANJUK, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF OF APPELLANT

MICHAEL E. TIGAR
P.O. Box 528
Oriental, North Carolina 28571
(202) 549-4229
metigar@gmail.com

DENNIS G. TEREZ
VICKI WERNEKE
Office of the Federal Public Defender
1660 W. 2nd Street, Ste. 750
Cleveland, Ohio 44113-1454
(216) 522-4856; fax (216) 522-4321
dennis_terez@fd.org
vicki_werneke@fd.org

LANNY A. BREUER
Assistant Attorney General
Criminal Division

By: JOSHUA STEPHEN JOHNSON
U.S. Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530
(202) 353-0114
joshua.johnson@usdoj.gov

SUSAN MASLING
Human Rights and Special
Prosecution Section
U.S. Department of Justice
10th & Constitution Ave., N.W.
Washington, D.C. 20530
(202) 616-2492; fax (202) 616-2491
susan.masling@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Rules

Federal Statutes

Miscellaneous

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to FRAP 34(a) and Sixth Circuit Rule 34(a), we request oral argument. This case meets the standards in Rule 34(a)(2) for oral argument: (a) this appeal is not frivolous; (b) the dispositive issues raised in this appeal have not been recently and authoritatively decided; and (c) this Court's decision-making process would be significantly aided by oral argument. This appeal concerns the fundamental constitutional obligation of a party — in this case, the United States Department of Justice's Office of Special Investigations — to respond to discovery requests in a timely and meaningful fashion; and the consequences when it failed to do so again. This appeal also concerns fraud on the court in a context where a party — again OSI — previously was the target of this Court's reprimand for such fraud. Last year, the appellant moved the court below to find fraud on the court once again for serious and prejudicial discovery failures. The court denied that motion. Because that denial lies within the broad historical context of this case spanning three and a half decades, oral argument would facilitate the discussion of that long history and its applicability here. As before when the appellant alleged fraud on the court and this Court granted oral argument, this time, too, oral argument will serve the important goal of a full airing of the issues presented in this appeal.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as the order appealed is a final decision from the United States District Court for the Northern District of Ohio. The originally named appellant in this case, John Demjanjuk, died on March 17, 2012. This appeal now continues with his estate, through his executrix, in his stead. Restoration of social security benefits and similar benefits which have been stopped as a result of Mr. Demjanjuk's denaturalization would result in the event this Court reverses the decision below and orders the relief originally requested be granted. The estate, thus, has a legally cognizable interest in this appeal's outcome, and is now the proper party. (For example, in the prior proceeding before this Court that set aside the first denaturalization judgment, the SSA paid all withheld benefits in a lump sum and reinstituted regular payments.) Other grounds continue to vest this Court with the jurisdictional authority to hear this appeal given that it raises a violation of this Court's specific instructions to the government defining its obligations in this and similar cases. *See, e.g., Republic National Bank of Miami v. United States*, 506 U.S. 80 (1992) (in rem proceeding not mooted by transfer of res because a favorable judgment would give litigant a right to seek return of the res and, thus, a financial stake in the outcome); *Christian Knights of Ku Klux Klan v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992) (government's wrongful conduct capable of repetition against litigant and others, but evading review). *Cf.*

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (dismissal of action does not deprive court of power to assess wrongful conduct by litigant and lawyers).

ISSUES PRESENTED FOR REVIEW

- Whether the court below committed reversible error by adjudicating a motion under Fed. R. Civ. P. 60 without conducting oral argument, without conducting any hearing, without allowing cross-examination of affiants on whose statements the lower court's ruling relies, without receiving or reviewing relevant and responsive documents and other information relevant to the case and earlier proceedings but not produced by the government in prior proceedings, and without giving the movant an opportunity to conduct further discovery to complete the record for purposes of litigating such motion.

- Whether the government violated its discovery obligations in failing to produce in earlier proceedings in this case, including proceedings before this Court, certain documents relevant to this litigation and undisputably responsive to discovery requests.

- Whether the government again committed fraud on the court by failing to produce certain documents relevant to this litigation and undisputably responsive to discovery requests made multiple times, even after the government had been sanctioned by this Court and by the court below, and had promised it would comply with its discovery obligations even beyond those set forth in the Federal Rules of Civil Procedure.

- Whether the court below committed reversible error by not granting the appellant's motion under Fed. R. Civ. P. 60 and reopening the denaturalization proceedings initiated by the government in 1999 in light of the government's violation of its undisputed discovery obligations and fraud on the court.

STATEMENT OF THE CASE

On April 29, 2011, the Office of the Federal Public Defender moved the district court for reappointment to represent John Demjanjuk. (Motion for Reappoint, R.212.) The FPD had previously represented Mr. Demjanjuk in the first denaturalization proceeding and before this Court. Over the government's objection (Response to Motion, R.213), the district court granted the motion on May 10, 2011. (Memo. Op. and Order, R.215.)

Mr. Demjanjuk filed his Motion Pursuant to Fed. R. Civ. P. 60 on July 19, 2011. (Motion Pursuant to Fed. R. Civ. P. 60, R.219; Memo. in Support of Rule 60 Motion, R.222.) He made his motion pursuant to Fed. R. Civ. P. 60(b)(6) and 60(d)(1) and (3) for relief from the final judgment and order in the second denaturalization proceeding against him. He also asked the district court to set aside the final judgment that ultimately led to his denaturalization and deportation to the Federal Republic of Germany. As part of his motion, he requested a briefing schedule; oral argument upon completion of all briefing; such further discovery and factual hearings as necessary to complete the record on the claims presented in the instant motion; and, upon the conclusion of such proceedings, an order that the court below set aside the judgment of Mr. Demjanjuk's denaturalization with prejudice.

After the government filed its opposition brief (Response to Motion, R.229) and

Mr. Demjanjuk filed his reply brief (Reply in Support of Rule 60 Motion, R.232), the district court denied the motion on December 20, 2011. (Memo. Op. and Order, R.237.) Mr. Demjanjuk filed a motion for reconsideration on January 5, 2012 (Motion for Reconsideration of Memo. Op. and Order of Dec. 20, 2011, R.238), which the government opposed (Opp. to Motion for Reconsideration, R.239) and the district court denied. (Memo. Op. and Order, R. 241). This timely appeal followed. (Notice of Appeal, R.242.)

STATEMENT OF THE FACTS

The lengthy procedural history of this case can be found in *United States v. Demjanjuk*, 367 F.3d 623, 627 (6th Cir.), *cert. denied*, 543 U.S. 970 (2004); *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied sub nom*. *Rison v. Demjanjuk*, 513 U.S. 914 (1994). The following summary provides salient facts up to the present. A more thorough summary is in a digitized interactive timeline attached to the Rule 60 motion as Exhibit A and made a part of this record. (Exh. A to Memo. in Support of Rule 60 Motion, R.223.)

In 1981, the district court revoked Mr. Demjanjuk's certificate of naturalization, and vacated the order admitting him to United States citizenship. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam,* 680 F.2d 32 (1982), *cert. denied,* 459 U.S. 1036 (1982). The proceedings were conducted by the Department of Justice's Office of Special Investigations. In 1985, this Court upheld an order extraditing Mr. Demjanjuk to Israel. *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). Mr. Demjanjuk was indicted and convicted before an Israeli court in 1988 for being trained in Trawniki, for being an SS guard at Sobibor, and for being "Ivan the Terrible" of Treblinka, for which he was sentenced to death by hanging. He appealed his conviction and sentence.

While Mr. Demjanjuk's appeal to the Supreme Court of Israel was pending,

newspaper articles appeared saying that the evidence against him was deeply flawed, and that the court below in Israel and the federal courts here had relied on that flawed evidence. The allegations were essentially that the United States government had withheld information from the defense and from the Courts showing Mr. Demjanjuk was not "Ivan the Terrible" of Treblinka.

On June 5, 1992, this Court issued an order setting a briefing schedule with an eye to reopening the extradition case.

> The petitioner-appellant, John Demjanjuk, was extradited to the State of Israel for trial of a capital offense, the commission of war crimes during World War II. In a previous decision of this court in this case, 776 F.2d 571 (6th Cir.1985), we declined to stop the extradition by issuing a writ of habeas corpus. Our previous study of the record and numerous recent press reports and articles in the United States indicate that the extradition warrant by the Executive Branch may have been improvidently issued because it was based on erroneous information. Consideration should be given to its validity and to whether this court's refusal to grant the petition for writ of habeas corpus was erroneous. . . . Pursuant to the authority stated in rule 40, Fed.R.App.Proc., pertaining to the rehearing of causes previously heard and Rule 60(b)(6), Fed.R.Civ.P., pertaining to relief from judgments previously entered, the Court, upon its own motion, makes the following orders . . . .

Demjanjuk v. Petrovsky, *supra*, Appendix 1, 10 F.3d at 356-57.

On August 11, 1992, this Court heard oral argument, and six days later ordered hearings to be conducted by a Special Master on possible fraud on the court. A year

later, the Supreme Court of Israel reversed the conviction of Mr. Demjanjuk. This Court then issued an order requiring his return to the United States while it reviewed the Special Master's findings. *See* Bench Ruling of Aug. 3, 1993, 1993 WL 394773 (6th Cir. 1993).

Later that year, this Court found the government had committed fraud on the court. The fraud was specifically the failure to turn over to the defense three protocols or interviews of individuals whose statements constituted exculpatory evidence, a list of known guards at Treblinka that did not contain Mr. Demjanjuk's name, and an interview memorandum made following the interview of former SS guard Otto Horn who served at Treblinka. "[W]e conclude that OSI did so engage in prosecutorial misconduct that seriously misled the court." *Demjanjuk v. Petrovsky*, 10 F.3d at 339. This Court found OSI attorneys had failed in their obligations to the Court, to the defense, and to the public.

> The attitude of the OSI attorneys toward disclosing information to Demjanjuk's counsel was not consistent with the government's obligation to work for justice rather than for a result that favors its attorneys' preconceived ideas of what the outcome of legal proceedings should be.
>
> * * * * *
>
> The OSI attorneys acted with reckless disregard for their duty to the court and their discovery obligations in failing to disclose at least three sets of documents in their possession before the proceedings against Demjanjuk ever reached trial.

Id. at 349-50.

On November 22, 1994, the government told the district court that OSI was going to redouble its efforts to ensure it met its discovery obligations.

> In response to the Sixth Circuit's 1992 reopening of the extradition proceeding, the Office of Special Investigations has taken steps to ensure that its attorneys exceed even the expansive discovery obligations codified in the December 1993 amendments to the Federal Rules of Civil Procedure.

(United States' Opp. to Defendant's Motions to Reopen, to Set Aside Judgment, and to Dismiss with Prejudice, filed Nov. 22, 1994 in Case No. C77-923, at n.5.)

With the extradition judgment and mandate recalled and set aside, the district court then reconsidered the first denaturalization judgment. It found the fraud had infected the first denaturalization against Mr. Demjanjuk. *United States v. Demjanjuk*, C77-923, 1998 U.S. Dist. LEXIS 4047 (N.D. Ohio Feb. 20, 1998). In fact, the court found the government had perpetrated ***additional*** fraud on the court by failing to share with defense counsel the identity of Jacob Reimer who served as a clerical official at the Trawniki training camp. OSI had interviewed Mr. Reimer, and determined he "had no useful information." *Id.* at * 12. OSI decided not to reveal the existence of Mr. Reimer to defense counsel. *Id.* at *11-12.

> The Court believes that simply vacating the judgment is not a sufficient sanction in light of the magnitude of the offense. Doubt cast upon the fairness of one judicial proceeding infects the whole justice system. ***Such***

> ***behavior whether or not intentional must not be tolerated.*** The sanction for it must be appropriately severe. Yet, in fashioning a response, a court must be vigilant that it not allow unspeakable horrors to go unpunished in the name of preserving the abstract principle of justice. Just as the government should not be able to profit from its misbehavior, neither should a defendant be insulated from the consequences of his alleged moral turpitude because he becomes the inadvertent beneficiary of sanctions against the government.
>
> Accordingly, it is the judgment of the Court that this case be dismissed without prejudice. Upon review of its evidence, if the government still believes it has a credible case against the defendant, it may refile an appropriate complaint seeking to revoke and set aside the order admitting the defendant to citizenship and canceling his certificate of naturalization, and ***attempt to prove its allegations on a level playing field***. Our system of justice requires no less of the government and demands no more of the defendant.

Id. at *18-20 (emphasis added, footnote omitted).

About a year and a half later, the government filed a new denaturalization complaint — the same case in which Mr. Demjanjuk filed the motion at issue here. The district court entered judgment against Mr. Demjanjuk, and this Court affirmed the judgment. Mr. Demjanjuk was then deported to Germany where he stood trial in Munich's Landgericht for being an accessory to murder as a guard during World War II at the Sobibor camp in what was then occupied Poland. A panel consisting of three judges trained in the law and two lay judges convicted Mr. Demjanjuk on May 12,

2011, and sentenced him to five years imprisonment with credit for time served (approximately two years). Both sides appealed to the Bundesgerichtshof in Karlsruhe. Mr. Demjanjuk was released pending further proceedings.

In April 2011, shortly before the trial in Germany ended, Associated Press reported that two of its journalists had found recently declassified FBI documents dated March 4, 1985 in the National Archives and Records Administration facility in College Park, Maryland. The FBI documents assert that the key evidence against Mr. Demjanjuk was "quite likely fabricated" by the KGB. (Memo. in Support of Rule 60 Motion, Exh. C, R.222.) The most widely reported document was Exh. D. (Memo. in Support of Rule 60 Motion, Exh. D, R.222.) There was also an accompanying transmittal document. (Memo. in Support of Rule 60 Motion, Exh. E, R.222.) *See also* Exhs. F and G (slightly different copies of these same documents the government produced on May 27, 2011). (Memo. in Support of Rule 60 Motion, Exhs. F and G, R.222.) The FBI wrote both documents when Mr. Demjanjuk was in custody on a warrant that ultimately resulted in his extradition to Israel in 1986.

Upon visiting the NARA facility in Maryland, the undersigned counsel discovered hundreds of files of documents that were recently declassified or partially declassified, that are relevant to this case, and that were subject to earlier discovery requests and applicable discovery rules. Once litigation over the Rule 60 motion

began, the government produced hundreds of pages of relevant, responsive documents that would have merited investigation. These documents would have been admissible into evidence or would have led to the discovery of admissible evidence. Many of them would have been admissible as government reports under Fed. R. Evid. 803(8), and, because they were authored by responsible government officials, would have been admissions of a party opponent.

As previously noted, Mr. Demjanjuk requested as part of his Rule 60 motion a briefing schedule, oral argument upon completion of all briefing, such further discovery and factual hearings as necessary to complete the record on the claims presented in the instant motion, and, upon the conclusion of such proceedings, an order setting aside the judgment of his denaturalization with prejudice. The court below granted only a briefing schedule. It then denied the entire Rule 60 motion on December 20, 2011. Mr. Demjanjuk was at that time living in a nursing home in Bavaria due to his frail health. He died there on March 17, 2012 while this appeal was pending. Counsel have filed a Notice of Death with the Court along with this brief.

After Mr. Demjanjuk's death, a spokesperson for the German court in Munich formally announced that, under German law, Mr. Demjanjuk had died an innocent man, since his death occurred before the German appellate court (the Bundesgerichtshof in Karlsruhe) heard his pending appeal. A number of legal

questions, including whether the German trial court even had jurisdiction and whether Mr. Demjanjuk's deportation to Germany was legal and proper, are still pending before the higher German court. Consequently, the disposition of this appeal will almost certainly have legal implications on the German appellate court's consideration of the issues pending there under generally accepted principles of international and comparative law, especially since the legality of the deportation itself is being challenged.

SUMMARY OF ARGUMENT

The court below committed substantive errors by concluding that the FBI documents it saw were neither exculpatory nor material, though they are both; by finding that there was no reasonable probability the result of the denaturalization proceedings would have been different if the withheld materials had been disclosed; and by allowing the government to do precisely what this Court prohibited in an earlier related proceeding, namely, to compartmentalize information in a way that resulted in no investigation by the government of apparently contradictory evidence. As a consequence of this conduct, Mr. Demjanjuk was deprived of information and materials critical to building his defense.

The district court reached the wrong conclusions about the withheld documents. It overlooked what the withheld documents described — persistent doubt by our country's largest law enforcement agency about the key evidence against Mr. Demjanjuk. The documents are exculpatory, since they question the heart of the case against John Demjanjuk. The documents are material, since they cast the entire case in a different light, particularly at the time when the documents were written and particularly when read in the context of the government's new assertion that the group prosecuting Mr. Demjanjuk never knew about these documents or the doubt they contained. The new light cast on this case would have been the defense team calling

to the stand multiple FBI agents for their direct testimony about their own writings supporting the defense. To realize it is in this context that this Court a short time later found the government to have committed fraud on the court is all the more reason to question what was really going on here. In sum, the case would have been dramatically different had the government complied with its discovery obligations.

The court below committed procedural errors by denying the Rule 60 motion without conducting any oral argument or a hearing, and without allowing any further discovery. It concluded "the internal FBI documents contain nothing more than the conjecture of an FBI agent, unsupported by investigation, that would have made no difference in refuting or undermining the Government's overwhelming evidence at the 2001 denaturalization trial." Yet it reached these conclusions without having seen all the internal FBI documents at issue, without asking the FBI agent who authored one of the documents whether the document in fact contained nothing more than conjecture, and without ever asking anyone in the government whether such conjecture, if that be the case, was in fact unsupported by investigation. The court below reached these conclusions without subjecting a single affiant to cross-examination, without testing the affidavits against undenied yet contradictory statements in unchallenged documents never produced though relevant and responsive to discovery requests years ago — in short, without allowing the adversary process

to work. This violated basic due process rights and fundamental fairness.

ARGUMENT

I. OSI VIOLATED THE LAW OF THE CASE AND *BRADY v. MARYLAND*, AND THEREBY AGAIN COMMITTED FRAUD ON THE COURT, BY WITHHOLDING EXCULPATORY AND MATERIAL DOCUMENTS.

The court below denied the motion made pursuant to Fed. R. Civ. P. 60(b)(6) and 60(d)(1) and (3) because it found no violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The court noted:

> To establish a *Brady* violation entitling Demjanjuk to relief from judgment under Rule 60, he must show that the Government (1) willfully or inadvertently withheld evidence, (2) favorable to the defendant, (3) that was material. *Hall v. Russell*, 339 Fed. Appx. 576, 578 (6th Cir. 2009) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).

(Memo Op. and Order, R.237, at p.17.)

The first two elements are not disputed. No one contests that the evidence at issue here was never turned over to the defense until Mr. Demjanjuk was already in the Federal Republic of Germany stripped of his citizenship. Similarly, no one has disagreed that the withheld documents are favorable to Mr. Demjanjuk. The district court did not even discuss that element.

A. Standard of Review.

This Court reviews a denial of Rule 60(b) or (d) motion for an abuse of

discretion. *Blue Diamond Coal Co. v. Trustees of the United Mine Workers of Am. Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001); *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009), *cert. denied,* ___ U.S. ___, 131 S. Ct. 102 (2010). "An abuse of discretion exists when a court commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *Yeschick v. Mineta*, __ F.3d __, 2012 WL 1139062 (6th Cir. 2012) (internal quotation omitted). The materiality component of a claim under *Brady v. Maryland* involves a mixed question of law and fact; therefore, the standard of review is de novo. *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991). The denial of a motion for a new trial based on a *Brady* violation is reviewed under abuse of discretion, but the district court's determination as to the existence of a *Brady* violation is reviewed de novo. *United States v. Graham*, 484 F.3d 413, 416-17 (6th Cir. 2007).

B. OSI Violated the Law of the Case.

The government acknowledges it never turned over the documents at issue dating back to the 1980s during any of the denaturalization proceedings, even though they were requested multiple times in multiple ways, and are responsive and relevant. The government argues it never needed to look for those documents because the FBI was not part of its prosecution team. According to OSI, the prosecution team

consisted of "the relevant offices involved in the investigation and litigation of this action -- namely the Office of Special Investigations (OSI), the Office of International Affairs (OIA), the Criminal Division's Appellate Section, and the United States's Attorneys Office for the Northern District of Ohio." (Response to Rule 60 Motion, R.229, at p.3, n.2.)

This excuse evokes the very kind of compartmentalization this Court rejected 18 years ago in these proceedings.

> Because the OSI attorneys consistently followed an unjustifiedly narrow view of the scope of their duty to disclose, and compartmentalized their information in a way that resulted in no investigation of apparently contradictory evidence, Demjanjuk and the court were deprived of information and materials that were critical to building the defense.

Demjanjuk v. Petrovsky, 10 F.3d at 342. This Court was on solid ground in prohibiting these types of discovery shenanigans. It continued:

> The [Supreme] Court has also made plain that the prosecution cannot escape its disclosure obligation by compartmentalizing information or failing to inform others in the office of relevant information. In *Giglio v. United States*, 405 U.S. 150 ... (1972), the government made the same "the-right-hand-did-not-know-what-the-left-hand-was-doing" argument as it makes here. The Court was quick to reject this excuse as a justification for withholding exculpatory material. The Court pointed out that "the prosecutor's office is an entity and as such it is the spokesman for the government." The Court held that the prosecutor's office — here OSI — is responsible as a

> corporate entity for disclosure.

Demjanjuk v. Petrovsky, *supra*, 10 F.3d at 353. The footnote to this section of this Court's opinion reads:

> The full paragraph in which this rule is expressed is as follows:
>
> > In the circumstances shown by this record, neither DiPaoloa's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. See Restatement (Second of Agency § 272. See also American Bar Association, Project on Standards for Criminal Justice, Discovery and Procedure Before Trial § 2.1(d). To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.
> >
> > [*Giglio v. United States*,] 405 U.S. at 154, 92 S. Ct. at 766.

Demjanjuk v. Petrovsky, *supra*, 10 F.3d at 353 n.2.

There is additional law of the case the government has violated here — the law that led this Court to previously find fraud on the court due to discovery violations.

> We believe *Brady* [*v. Maryland*, 373 U.S. 83 (1963),] should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against. If the government had sought to denaturalize Demjanjuk only on the basis of his misrepresentations at the time he sought admission to the United States and subsequently when he applied for citizenship, it would have been only a civil action. The government did not rest on those misrepresentations, however. Instead, the respondents presented their case as showing that Demjanjuk was guilty of mass murder.
>
> The OSI prosecutors knew that *Brady* requires disclosure of exculpatory information in criminal cases. The Director of OSI, Mr. Ryan, testified that it is "fundamentally unfair" not to follow the *Brady* principle in OSI cases and that he intended for the office to follow this principle of full disclosure of exculpatory materials.... It is not sufficient to say, as the Special Master concludes, that no prosecutorial misconduct occurred under the *Brady* principle because no particular individual at OSI has been proved to have acted in "bad faith" with the express intent of suppressing exculpatory evidence.
>
> In *Brady* itself, the Court stated that the failure to disclose material information is a due process violation "irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 86 ... (1963). Otherwise, the prosecutor can proclaim that his heart is innocent and his failure inadvertent, a claim hard to disprove, while at the same time completely disregarding his duty to disclose.
>
> * * * * *
>
> We believe the OSI attorneys had a constitutional duty to

> produce "all evidence favorable to an accused [Demjanjuk]," which the Special Master found he had requested and that was "material ... to guilt or to punishment irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196.
>
> Thus, we hold that the OSI attorneys acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly. This was fraud on the court in the circumstances of this case where, by recklessly assuming Demjanjuk's guilt, they failed to observe their obligation to produce exculpatory materials requested by Demjanjuk.

Demjanjuk v. Petrovsky, 10 F.3d 338, 353-54 (6th Cir. 1993), *cert. denied sub nom*. *Rison v. Demjanjuk*, 513 U.S. 914 (1994) (footnote omitted).

This opinion is binding precedent, res judicata, and the law of the case. *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pacific Railway Co. v. United States*, 168 U.S. 1, 48-49 (1897) (holding that the United States is not entitled to relitigate issues decided against it in prior lawsuit on the same matters)). *See also United States v. Rayborn*, 495 F.3d 328 (6th Cir. 2007), *cert. denied*, 552 U.S. 1310 (2008); *Litman v Mass. Mutual Life Ins. Co.*, 825 F.2d 1506 (11th Cir 1987), *cert. denied*, 484 U.S. 1006 (1988).

The government has done it again.

This time its narrowly defined prosecution team excluded the FBI and other agencies having interest and involvement in the case. The court below accepted this

explanation. This explanation, however, does not hold up to scrutiny.

Self-defined prosecution teams are not supposed to wear blinders, but are to err on the side of production. The government admits it once made inquiry of the FBI "per [OSI] standard practice" seeking relevant materials in 1979, the same year OSI was created. (Response to Rule 60 Motion, R. 229, at p.32). But once was not enough — nor was it in compliance with the law.

OSI, now a part of the Department of Justice's Human Rights and Special Prosecutions Section, believes it is excused for this lapse because "it had not subsequently partnered with the FBI on this case, the prosecution team had no basis to suppose that counter-intelligence agents at the Cleveland FBI office had, since the initiation of the first denaturalization case, created documents theorizing that the prosecution team might be relying on forged documents or that anyone at FBI had once harbored concerns about the Justice Department's case. Thus subsequent checks were not made." *Id*. at 32-33.

That is not the standard this Court mandated. Moreover, this lengthy excuse contains no explanation why checking the FBI for possibly relevant or responsive materials was OSI's standard practice in 1979 but not for the next three decades while it was prosecuting Mr. Demjanjuk. The government offers no explanation as to how this Court should square this excuse with OSI's promise that its attorneys' efforts

"exceed even the expansive discovery obligations codified in the December 1993 amendments to the Federal Rules of Civil Procedure." Had promises made to the Court been kept, the government would have produced the FBI files decades ago. Moreover, with full disclosure, there is a reasonable probability the outcome of Mr. Demjanjuk's second denaturalization would have been different, if it took place at all, and this appeal would not be before this Court today.

After its creation in 1979, OSI was also not apparently following standard Department of Justice policy regarding discovery. According to the United States Attorney's Manual:

> Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999).

USAM § 9-5.001(C).

Furthermore, every civil lawyer knows that actual possession is not required for production. The obligation to produce applies if the party has either possession, custody or control or the legal right to obtain the documents on demand. *In re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995). Lack of coordination among

persons or elements of the same agency, even if inadvertent, is also unavailing. In *Santobello v. New York*, 404 U.S. 257, 260 (1971), one assistant district attorney had made a plea bargain. Another assistant in the same agency, unaware of the bargain, failed to honor the promise that the state would make no recommendation as to sentence. The Supreme Court observed, "This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them." *Id*. at 260.

The irony of the situation is this: the compartmentalization the government wishes this Court to accept is in reality a leaky sieve with information going back and forth between the FBI and OSI — unless we are to believe that the documents now authenticated by the government's own witnesses recount events that never happened. One need only point to Exhibit E of the Rule 60 Motion, which is the cover document that accompanied the March 4, 1985 memorandum by Cleveland FBI. It begins:

> Pursuant to instructions of FBIHQ in referenced airtel, Cleveland is enclosing five (5) copies of an LHM captioned as above, ***to be discussed with USDJ, Office of Special Investigations***, in coordination with INTD/CI-1A, and Executive Agencies Unit (EAU).

(Memo. in Support of Rule 60 Motion, Exh. E, R.222.) (Emphasis added.) The fact

that one of the recipients of this memorandum can no longer remember reading it or acting on it or distributing it — this according to one of the affidavits supporting the government's opposition — does not mean those things were not done. And if they were in fact not done despite the clear instruction, the defense has a right to know why. No affiant helping the government in its opposition has said these words were a lie.

The collaborative efforts between OSI and the FBI are documented elsewhere. Three months earlier the same special agent in charge of Cleveland FBI explained to the FBI Director:

> Cleveland submitted the referenced airtels under an FCI-R caption and requested guidance as to how to proceed. This matter was coordinated with EAU Chief Storm Watkins, who advised that the matter is one that should be more appropriately handled by his unit, ***which has liaison with the DOJ's OSI regarding alleged Nazi war criminals***.

(Reply in Support of Rule 60 Motion, Exh. C, R.232, at p.2.) (Emphasis added.) The relationship between the FBI and OSI is explained earlier in that same document.

> Matters related to efforts by the U.S. Government to have captioned subject [John Demjanjuk] denaturalized and deported because of alleged activities as a Nazi prison guard, and information coming to the attention of the FBI bearing upon such efforts, should be submitted, under the appropriate caption, to the attention of the Executive Agencies Unit (EAU), Records Management Division, FBI Headquarters. The EAU ***has responsibility for liaison with***

> ***the Office of Special Investigations (OSI)***, U.S. Department of Justice, which is the Office charged with responsibility for locating and prosecuting Nazi war criminals in the United States.

Id. at 1 (emphasis added). As with the document discussed immediately above, no affiant helping the government in its opposition or on which the court below relied ever said this was a lie.

The collaboration between the FBI and OSI is also illustrated in a document the government produced for the first time on May 27, 2011. Again with the captioned subject "John Demjanjuk" and authored by the special agent in charge of Cleveland FBI, the previously classified document dated April 24, 1986 says:

> For information of captioned file, this writer attended a film presentation at the FBI Conference Room on 4/23/86 at 1:00PM with AUSA GARY R. ARBEZNIK, IVAN I. BEZUGLOFF, JR. and MICHAEL NUSSBAUM. The film came from the Soviet Union and was mailed to the U.S. Attorney's Office. The film essentially purported to present a historical picture of Ukrainian Nationalists/Fascists who were misguided by Bourgeois leaders and outside influences.

(Reply in Support of Rule 60 Motion, Exh. D, R.232.) Why would an assistant United States attorney from Cleveland be meeting with FBI agents at Cleveland FBI reviewing a film the U.S. Attorney's Office received if there was no collaboration between OSI and the FBI? Who were the other individuals mentioned that viewed the film and what was their relationship to the case? If OSI really did all of its own

investigation on Nazi war criminal cases, why was someone from the prosecution team sharing evidence with the FBI? If there was no collaboration between the FBI and OSI on Nazi war criminal cases, how would the assistant U.S. attorney even know to share the evidence with the FBI? Why waste the time doing so if there really was no collaboration?

C. OSI Violated *Brady v. Maryland.*

Since there is no dispute the government withheld documents and they are favorable to the defense, we are left with the third element to consider, namely, whether the withheld documents are material. The court below set forth the following law on this element.

> Evidence is "material" where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Strickler*, 527 U.S. at 281. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985)). The Supreme Court has held that "*Brady* materiality is not a strictly quantitative inquiry. Rather, it is more of a qualitative inquiry in which a reviewing court must ask whether the suppressed evidence casts sufficient doubt on a [ ] conviction that it puts the case 'in a different light.'" *Smith v. Metrish*, 436 Fed. Appx. 554, 563 (6th Cir. 2011) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995)). The mere possibility that an item of undisclosed information might have affected the outcome is insufficiently material. *Peltier*, 553 F. Supp. at 899 (citing *[United States v.] Agurs*, 427 U.S. at 110

> [1976]). In short, "in order to fall within the scope of the *Brady* rule, the evidence must be both exculpatory and material." *Caldwell v. Bell*, 9 Fed. Appx. 472, 481 (6th Cir. 2001) (citing *Bagley*, 473 U.S. at 682).

(Memo. Op. and Order, R.237, at p.17.)

Under any standard we use, the withheld documents are material. They cast the entire case in a different light, particularly when the time they were written is taken into consideration. We quickly see that different light when we examine just the FBI documents from March 1985 in which the agent asserts that the key evidence against Mr. Demjanjuk was "quite likely fabricated" by the KGB. (Memo. in Support of Rule 60 Motion, Exh. C, R.222.) The most widely reported document is Exh. D. (Memo. in Support of Rule 60 Motion, Exh. D, R.222.) There is also an accompanying transmittal document that, while not the subject of news reporting, possibly presents the more serious discovery violation. (Memo. in Support of Rule 60 Motion, Exh. E, R.222.) *See also* Exhs. F and G (slightly different copies of the same documents the government produced on May 27, 2011). (Memo. in Support of Rule 60 Motion, Exhs. F and G, R.222.)

From the March 4, 1985 memorandum we learn:

> Investigation at Cleveland, **including interviews of various Soviet emigres, coupled with past history of Soviet Intelligence Service (KGB) techniques**, has strongly indicated that the following scenario, involving Soviet utilization of the USDJ Office of Special

Investigation (OSI) to effect Soviet purposes:

1. Through its spotter service within the Soviet emigre community in the United States, the KGB learns of prominent emigre dissidents speaking out publicly and/or leading emigre groups in opposition to the Soviet leadership in the USSR.

2. The KGB, in continuation of internal security measures extended into the United States, initiates an anonymous letter to USDJ/OSI, accusing the emigre dissident of being a former war criminal guilty of atrocities during World War II.

3. USDJ/OSI initiates an investigation into background of the accused emigre. Lacking evidence of the allegation's veracity, USDJ/OSI, thereupon sends results of their investigation to KGB/Moscow, requesting review of records seized from Nazi Prison Camps in the aftermath of World War II for evidence which might substantiate the accusation.

4. The KGB then produces a record purporting to tie the accused with the commission of Nazi atrocities, which record may be falsified for the express purpose of discrediting the accused.

5. The KGB then makes the questioned records "available" to USDJ for action against the accused in immigration court. A KGB officer is dispatched from a Soviet embassy or consulate in the United States, to "present" the questioned records in court, but not to permit its examination by document experts.

6. In court, the KGB officer thereupon "shows" the documents to the judge, but does not permit the

> documents to be presented in evidence or to be otherwise copied; thus barring United states authorities or the court from examining the the [sic] authenticity of the records.
>
> 7. The end result is that justice is ill-served in the prosecution of an American citizen on evidence which is not only normally inadmissable [sic], in a court of law, but based on evidence and allegations quite likely fabricated by the KGB.
>
> **Cleveland opines that the instant matter is an extension of Soviet "Active Measures" activities conducted by Line PR of the First Directorate, KGB, designed to demonstrate that the long arm of the KGB, in monitoring the activities of Soviet emigre dissidents, especially those actively engaged in anti-Soviet organizations or public expression. The utilization of false information and documentation is a common practice of the KGB.**

(Memo. in Support of Rule 60 Motion, Exh. F, R.222, at pp.2-3.)

Had the defense been able to see this memorandum at the beginning of this case, we would have been able to seek further discovery on the "various Soviet emigres" interviewed, on the past history of the KGB techniques the Cleveland FBI office studied, or on the four years of work the Cleveland FBI office undertook on this case ***despite*** the FBI Director's instructions to the contrary.

KGB techniques for forgeries or "disinformation" — to use the English translation of a word coined by the KGB itself — were often employed for political

purposes. *See* Senate Report 99-522, Oct. 3, 1986, available at intelligence.senate.gov/pdfs99th/99522.pdf, (documents Soviet forgery efforts). For example, in 1986, Soviet agents sought to implicate the Chairman of the Senate Select Committee on Intelligence with a forged letter. *See id*. at pp. 31-32 and Appendix F. In the context of this history from the mid-1980s, the Cleveland FBI office memorandum dated March 4, 1985 discussing KGB techniques takes on additional significance.

It is safe to say that Mr. Demjanjuk could well have called multiple FBI agents and FBI interviewees and FBI informants as witnesses in support of his defense. It is safe to say his defense would have been very different in this case. The result could have been different, too. *See* Memo. in Support of Rule 60 Motion, Exhs. J, ¶ 12; Exh. K, ¶ 13, R.222.

There is another troubling, ongoing discovery lapse here. As demonstrated even in the few short quotations above, some of the material in key documents remains classified. The language in bold was redacted on the copy of the FBI memorandum at NARA and the one the AP obtained. It was not until October 18, 2011 when the government filed its opposition brief to the Rule 60 motion that the defense ***for the first time*** saw the entirely unredacted memorandum.

When a memorandum dealing exclusively with Mr. Demjanjuk and the proceedings against him have entire portions and seemingly key paragraphs redacted

because those portions are still classified (*see, e.g.,* Memo. in Support of Rule 60 Motion, Exh. Q, p.4; Exh. D, R.222), it seems impossible that the government meets the full scope of its discovery obligations by turning over such redacted materials. Litigants routinely handle classified materials through the appropriate protections of the Classified Information Procedures Act, 18 U.S.C. App. III, §§1-16, in criminal cases or through security clearances and protective orders in civil cases so that the government can meet its discovery obligations. Yet nothing similar appears to have been done in this case. *See* Memo. in Support of Rule 60 Motion, Exh. J, ¶ 13; Exh. K, ¶ 14, R.222.

The March 1985 Cleveland FBI documents unquestionably fall within the broad parameters of Fed. R. Civ. P. 34(a): "any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served." The language quoted here from Fed. R. Civ. P. 34 is from the 1999 version of the rule when the government began the second denaturalization proceeding against Mr. Demjanjuk. Yet the government never produced these documents to the lawyers who earlier represented Mr. Demjanjuk in this case. *See* Declaration of Michael E. Tigar, ¶¶ 9-10 (Memo. in Support of Rule 60 Motion, Exh. J, R.222); Declaration of John Broadley, ¶¶ 10-11 (Memo. in Support of Rule 60 Motion, Exh. K, R.222).

A denaturalization proceeding is a civil proceeding, thus subject to the Federal Rules of Civil Procedure. *United States v. Mandycz*, 447 F.3d 951, 962 (6th Cir.), *cert. denied,* 549 U.S. 956 (2006); *Addington v. Texas*, 441 U.S. 418, 424 (1979). Two rules in particular, Fed. R. Civ. P. 26 and 34, obligated the government to disclose materials in its possession, custody, or control relevant to the government's claim and Mr. Demjanjuk's defense.

"Parties may obtain discovery regarding any matter . . . which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery . . . including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things." Fed. R. Civ. P. 26(b)(1). These materials are subject to discovery "upon a showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3).

The government's discovery obligations covered more and more materials as the Iron Curtain fell giving the government new access to foreign archives from which it obtained information and materials. "A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the

additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1). All of these rule quotations are from the 1999 version of the Federal Rules of Civil Procedure as they were in effect when the government initiated the second denaturalization proceeding against Mr. Demjanjuk.

Beyond simply Fed. R. Civ. P. 34, the March 1985 Cleveland FBI documents are relevant and responsive to any number of discovery requests and disclosure requirements in (a) the denaturalization case (before the late former Chief Judge Battisti), (b) the extradition case before the same judge, (c) the fraud on the court proceedings in this Court, (d) the fraud on the court proceedings before the Special Master, (e) the litigation on whether to set aside the first denaturalization judgment in which litigation the district court (former Judge Matia) focused on the extent and nature of government failure to disclose, (f) the affidavit of good cause attached to the renewed denaturalization complaint in 1999, (g) the second denaturalization trial in the district court (former Chief Judge Matia), (h) the subsequent proceedings in this Court where the reliability of the Trawniki card and other material that came with Note 100 was in issue, (I) the Freedom of Information Act suits the defense initiated in this case, *see Nishnic v. U.S. Dept. of Justice*, 671 F. Supp. 771 (D.D.C.), *aff'd*, 828 F.2d 844 (D.C. Cir. 1987), *recon. denied*, 1987 WL 19434 (D.D.C. Oct. 20, 1987),

stay denied, 1987 WL 28478 (D.D.C. Dec. 16, 1987), (j) all the deportation, removal and extradition proceedings that first removed Mr. Demjanjuk to Israel and then to Germany, (k) the trials in both of those countries, and (l) the appeal to the Supreme Court of Israel that reversed Mr. Demjanjuk's first convictions.

The March 1985 Cleveland FBI documents are key exculpatory memoranda authored by the government's main investigatory agency in a branch office situated in the very town where the proceedings against Mr. Demjanjuk unfolded. These and potentially the hundreds of other documents still withheld or classified would have cast this case in an entirely different light. The court below was wrong to conclude that these documents were not material.

D. OSI Committed Fraud on the Court Again.

The defense sought extraordinary relief due to the extraordinary circumstances presented here. The exceptional and extraordinary circumstances presented in the motion met the standards in *Demjanjuk v. Petrovsky* for the remedy sought.

Fed. R. Civ. P. 60(b)(6) provides: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." This rule gives a court broad authority to set aside a final judgment on a case-by-case basis "when the movant shows 'any

. . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863, n.11 (1988); *Klapprott v. United States*, 335 U.S. 601, 613 (1949) (opinion by Black, J.)); *Olle v. Henry & Wright Corp.,* 910 F.2d 357, 365 (6th Cir. 1990) (internal citations omitted).

A movant satisfies the burden under Rule 60(b)(6) upon a timely showing of "exceptional or extraordinary circumstances." *Olle v. Henry & Wright Corp.*, *supra*; *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d at 524; *see also Gonzalez v. Crosby*, 545 U.S. at 535-36; *Ackermann v. United States*, 340 U.S. 193, 199 (1950); *Gerber v. Riordan*, 2010 WL 906434, *1 (N.D. Ohio Mar. 12, 2010) ("[r]elief under Rule 60(b)(6) requires a showing of extraordinary circumstances") (internal citations omitted). *Cf. Leverton v. Pope*, 100 Fed. Appx. 263 (5th Cir. 2004) (upholding lower court's denial of Rule 60(b)(6) motion citing to lack of "extraordinary circumstances").

Fed. R. Civ. P. 60(d)(1) provides in relevant part: "[Rule 60] does not limit a court's power to entertain an independent action to relieve a party from a judgment, order, or proceeding." An independent cause of action under Rule 60(d)(1) is to be applied in "those cases of 'injustice which, in certain instances, are deemed

sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." *United States v. Beggerly*, 524 U.S. 38, 46 (1998) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)). Thus, a movant must show "unusual or exceptional circumstances" to gain relief through an independent cause of action under Rule 60(d)(1). *Rader v. Cliburn*, 476 F.2d 182, 184 (6th Cir. 1973).

In *Barrett v. Sec'y of Health & Human Servs.*, 840 F.2d 1259 (6th Cir. 1987), this Court elaborated, outlining the elements necessary for a Rule 60(d)(1) independent cause of action: "(1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law." 840 F.2d at 1263. This Court most recently reaffirmed these standards in *Mitchell v. Rees*, 651 F.3d 593 (6th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1111 (2012).

Fed. R. Civ. P. 60(d)(3) " does not limit a court's power to set aside a judgment for fraud on the court." To establish fraud upon the court under this rule, a movant must show that the alleged conduct was all of the following: (1) committed on the part

of an officer of the court; (2) directed to the judicial machinery itself; (3) intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; (4) a positive averment or a concealment when one is under a duty to disclose; and (5) deceptive of the court. *Workman v. Bell*, 227 F.3d 331, 336 (6th Cir. 2000).

As this Court held in the first finding of fraud on the court in Mr. Demjanjuk's proceedings:

> "Fraud upon the court should . . . embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct."

Demjanjuk v. Petrovsky, *supra*, 10 F.3d at 353 (quoting 7 MOORE'S FED. PRAC. AND PROCEDURE ¶ 60.33).

A court has inherent authority to grant relief for "after-discovered fraud" regardless when the judgment has been entered. *Demjanjuk, supra*, 10 F.3d at 356. *See also Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 244 (1944). This equity rule is appropriate where the court deems circumstances "sufficiently gross to demand a departure from rigid adherence to the term rule." 322 U.S. at 244. Courts have used this power without hesitation where enforcement of its earlier judgment is "manifestly unconscionable." *Id.*

This Court, echoing the Supreme Court, has made clear that depriving a litigant of a day in court can be a valid sanction for egregious discovery and disclosure failures. *See Harmon v. CBX Transp. Inc.*, 110 F.3d 364 (6th Cir.), *cert. denied,* 522 U.S. 868 (1997). In this instance for the government as litigant, there were both ample warnings and ample notices of consequences. In *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639 (1976), the Supreme Court upheld a dismissal sanction without even waiting for full briefing and argument. The Court apparently recognized that celerity and severity go together to deter misconduct. 427 U.S. at 643 (stating that severe sanctions must be available for misconduct in order to penalize the wrongdoer and deter others).

This Court recently affirmed a lower court decision holding that failure to produce potentially exculpatory evidence creates the requisite "extraordinary circumstances" to set aside a final judgment — even so far as to restore a person to freedom who previously sat for years on Ohio's death row. *D'Ambrosio v. Bagley*, 688 F. Supp. 2d 709 (N.D. Ohio 2010), *aff'd*, 656 F.3d 379 (6th Cir. 2011), *cert. denied sub nom. Bobby v. D'Ambrosio*, ___ U.S. ___, 132 S. Ct. 1150 (2012). A similar, indeed a more extensive failure to produce documents during discovery in a denaturalization proceeding should be addressed in the same manner as the failure to produce exculpatory evidence in a criminal case.

The facts of *D'Ambrosio v. Bagley* are instructive here. A three-judge panel of an Ohio trial court had convicted the defendant of aggravated capital murder and sentenced him to death. In his post-conviction petition in the district court, the defendant claimed the State had improperly withheld potentially exculpatory evidence. Pursuant to this claim, the defendant was granted further discovery, which the defense and the district court believed had been successfully completed. The district court subsequently issued an order instructing the State either to set aside the conviction and sentence or to conduct a new trial. If electing a new trial, the State had 180 days to do so.

Several months later, the State produced new, previously undisclosed exculpatory evidence. A new trial was not permitted to move forward until the defendant was able to examine the new evidence. In response, the State asked the district court to extend the deadline to reprosecute. The defense opposed this motion, and asked the court to bar reprosecution. The court denied the State's motion, and set aside the conviction and sentence on the grounds that the State had not engaged in a good faith effort in discovery and had withheld material evidence until the eve of trial. The court, however, refused to bar reprosecution, stating that Mr. D'Ambrosio had not been materially prejudiced by the delay resulting from the State's discovery violations. The defendant then filed a Rule 60(b) motion asking the district court to

vacate its decision to not bar reprosecution.

In considering the defendant's Rule 60(b) motion, the court found that the State had in fact withheld evidence from the defense that "would have substantially increased a reasonable juror's doubt . . . of guilt." 688 F. Supp. 2d at 728. Such untenable conduct by the State "led to material prejudice against D'Ambrosio's ability to defend himself at a new trial." 688 F. Supp. 2d at 731. "Had this court known of that prejudice . . . it would not have permitted reprosecution to proceed." *Id*. The court emphasized that it was not barring reprosecution through the operation of Rule 60(b) itself; rather, the court was vacating the prior judgment declining to bar retrial, and entering "a new judgment [reaching] the opposite conclusion." 688 F. Supp. 2d at 732.

Although the instant case is a denaturalization proceeding and not a criminal case, the legal issues and context are strikingly similar to those in *D'Ambrosio v. Bagley* to warrant a similar outcome. Like Mr. D'Ambrosio, Mr. Demjanjuk's defense was hindered by the government's failure to meet its obligations in discovery.

The importance to the defense team of the March 1985 Cleveland FBI documents in all of Mr. Demjanjuk's legal proceedings since FBI agents drafted those documents is incalculable. The court below held that these documents "contain nothing more than the conjecture of an FBI agent, unsupported by investigation, that

would have made no difference in refuting or undermining the Government's overwhelming evidence at the 2001 denaturalization trial." (Memo. Op. and Order, R.237, at p.1.) The defense disagrees.

These documents contain conclusions of experienced law enforcement personnel employed by an agency with expertise about the KGB's tactics. The document itself would have been admissible under Fed. R. Evid. 803(8) if offered by Mr. Demjanjuk. If the documents had been previously produced, counsel could have deposed the documents' authors. This would have been particularly important in light of what appears to be a significant and developing rift between the views of OSI and special agents in Washington, D.C. and the Cleveland FBI office. The documents would have been key in cross-examining various expert witnesses the government offered at the second denaturalization trial. Moreover, had the government shared them with the defense and then brought them to the attention of the Israeli prosecutors, the entire drama of Mr. Demjanjuk's trial, conviction, imposition of the death sentence, reversal by the Israel Supreme Court, and the ultimate return of Mr. Demjanjuk to the United States might have been avoided. So, too, would the monumental stigma that Mr. Demjanjuk and his family have suffered through over three decades of legal proceedings.

One thing is for certain: Mr. Demjanjuk's defense would have been more persuasive, more powerful, and more pointed than the one he was able to put on. But because the government chose to withhold those documents and others, Mr. Demjanjuk was deprived of his lawful right to put on the defense he sought, and was prevented from obtaining the benefit of that defense. *See California v. Trombetta*, 467 U.S. 479, 485 (1984); *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (constitutional guarantee under the due process clause that the defense be able to present a complete defense as a notion of fundamental fairness).

There is also another striking similarity between this case and *D'Ambrosio v. Bagley*. The government's withholding of discovery the first time around resulted in the lower court's decision to vacate Mr. Demjanjuk's first denaturalization order without prejudice. *See United States v. Demjanjuk*, C77-923, 1998 U.S. Dist. LEXIS 4047, * 11 (N.D. Ohio Feb. 20, 1998) ("Such behavior whether or not intentional must not be tolerated."); *see also Demjanjuk v. Petrovsky*, *supra*, 10 F.3d at 350 ("[t]he OSI attorneys acted with reckless disregard for their duty to the court and their discovery obligations in failing to disclose at least three sets of documents in their possession before the proceedings against Demjanjuk ever reached trial"). Similar to the discovery violations that were first presented to the district court in Mr. D'Ambrosio's case, OSI's violations in the late 1970s, the1980s and early 1990s did not warrant in

the lower court's view a prohibition against future denaturalization proceedings. As in *D'Ambrosio v. Bagley*, ongoing discovery violations now plainly warrant that prohibition.

In *Demjanjuk v. Petrovsky*, *supra*, this Court vacated the order as to Mr. Demjanjuk's extradition, finding that "the judgments were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court." 10 F.3d at 356. The prosecutors had "[failed] to disclose at least three sets of documents in their possession before the proceedings against Demjanjuk ever reached trial." 10 F.3d at 350. Withholding this evidence "almost certainly misled [Demjanjuk's] counsel and endangered his ability to mount a defense." *Id*. OSI also had "acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly," and thus had committed fraud on the court. *Id*. As a result, the extradition order was vacated, the district court in turn vacated the denaturalization order, and Mr. Demjanjuk's citizenship was restored.

The denaturalization order currently in place against Mr. Demjanjuk should be vacated, too. Putting aside the practical prejudice Mr. Demjanjuk's estate suffers so long as that order is in place, the current claims concern the same kind of misconduct having the same kind of detrimental impact on a party's ability to present a defense.

The government's conduct has left an indelible mark upon the lives of Mr. Demjanjuk and his family. It has eroded the public trust in these proceedings. It has undermined our confidence in one of the most powerful sanctions a federal court can impose on an American citizen — to strip that individual of his citizenship and to leave him stateless. It bears repeating lest there be any doubt: the defense did not bring the Rule 60 motion hastily or without lengthy consideration of its consequences. Serious questions remain, however, about the integrity of the judicial process that resulted in Mr. Demjanjuk's being stripped for a second time of his United States citizenship and being shipped to Germany to stand trial there.

Sloppiness or inadvertence arises to some degree in every litigation in every court in this country and elsewhere. Judicial systems are after all institutions created and run by fallible human beings. But context is everything in this proceeding — a rare proceeding indeed that found a man accused and convicted of being someone he was not, sentenced to die for it, and then acquitted and set free by the Supreme Court of a country that had the most to lose by letting a man accused of Nazi war atrocities go free. And all of that was triggered by the fact that the government had the wrong person — but insisted all along and under oath that it was right even though its representatives knew better. The lesson should have been learned and the playing field leveled. If nothing else, the files in the FBI's Cleveland office should have been

gone over with a fine-tooth comb. Perhaps they were — and that's just part of the problem presented in this motion.

Were we to let stand the district court's ruling and accept OSI's explanation that it never knew the FBI was investigating this matter, whether from the Washington headquarters, the Cleveland field office, or both, that would bend credulity far beyond the breaking point. More significantly for present purposes, that explanation also bends the law far beyond its breaking point.

For the extraordinary relief requested here, there was a very ordinary solution possible years ago. The present situation would never have arisen had the government simply stuck to earlier representations it had made to the Courts regarding the fulfillment of its discovery obligations. Asking all agencies possibly involved with the investigation of Mr. Demjanjuk for their file materials in order to fulfill the government's discovery obligations would have in the end been far easier than defending against motions that challenge all that preceded this filing.

Mr. Demjanjuk's motion was prompted by good investigative work by two journalists. One might respond to this motion by challenging the defense to go out and do its own file search at NARA's facilities in College Park, Maryland. We did that, and made little progress not because of our own deficiencies but because of the way the government maintains materials at NARA.

There are several problems that seem to have gone unaddressed in this litigation. First, searching NARA files with the subject line "John Demjanjuk" or something similar often produces only "withdrawal notices." *See, e.g.,* Memo. in Support of Rule 60 Motion, Exh. R, R.222. Too little information is given on the notice to determine whether the withdrawn materials are even relevant and worth pursuing. Some "withdrawal notices" have broad subject lines that, experience tells us, encompass materials that are relevant to this case. (Memo. in Support of Rule 60 Motion, Exh. S, R.222.) But when hundreds of such "withdrawal notices" are substituted for the actual documents, it is then impossible for defense counsel to determine which materials are worth pursuing via a FOIA request. Some subject lines are too vague or incomplete even to guess whether the materials that have been withdrawn are worth pursuing. (Memo. in Support of Rule 60 Motion, Exh. T, R.222.) Nevertheless, experience again tells us that some of these files also contain relevant materials. In the end, no defense lawyer should have to go on a fishing expedition to find materials already in the government's possession, custody or control and subject to discovery. One of the undersigned attorneys (Werneke) submitted FOIA requests with NARA on May 20, 2011, concerning several of these "withdrawal notices." Neither NARA nor any other agency has responded to date. (Memo. in Support of Rule 60 Motion, Exhs. U and V, R.222.)

II. THE DISTRICT COURT COMMITTED SERIOUS PROCEDURAL ERROR BY DENYING THE RULE 60 MOTION WITHOUT ANY FURTHER HEARING OR PROCEEDING.

The court below denied the Rule 60 motion without holding oral argument, without conducting an evidentiary hearing, and without allowing further discovery necessary to complete the record on the claims presented. The failure to allow any of these steps constituted serious procedural error, requiring remand at a minimum.

A. Standard of Review.

This Court reviews procedural errors by the district court in adjudicating motions for an abuse of discretion. "Courts addressing Rule 60(b) motions must consider the equities, and the incessant command of the court's conscience that justice be done in light of all the facts." *Thompson v. Bell*, 580 F.3d at 444 (internal quotation omitted). As noted earlier in this brief, the materiality component of a claim under *Brady v. Maryland* involves a mixed question of law and fact; therefore, the standard of review is de novo. *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991). The denial of a motion for a new trial based on a *Brady* violation is reviewed under abuse of discretion, but the district court's determination as to the existence of a *Brady* violation is reviewed de novo. *United States v. Graham*, 484 F.3d 413, 416-17 (6th Cir. 2007).

B. The Court Below Committed Error by Making Factual Findings on Key Disputed Issues Without Argument, Without Further Discovery, and Without a Hearing.

In denying Mr. Demjanjuk's Rule 60 Motion, the district court was required to resolve factual disputes about the contents of documents. The court also had to determine the veracity of government affiants in what they said in their affidavits. The court relied particularly heavily on the affidavit of Special Agent Thomas Martin of the Cleveland FBI Office in adjudicating the motion.

The court below made these determinations on disputed facts without conducting any type of in-court proceeding — whether it be oral argument or an evidentiary hearing. As a consequence, the court never allowed the position of the government and its affiants to be tested through cross-examination. In fact, no one was questioned about any of the contents of the documents at issue or of their affidavits. The defense presented the court with two declarations. The government presented the court with six affidavits.

The court took this approach apparently because of its conclusion found at the beginning of its order, namely, that "the internal FBI documents contain nothing more than the conjecture of an FBI agent, unsupported by investigation, that would have

made no difference in refuting or undermining the Government's overwhelming evidence at the 2001 denaturalization trial." (Memo. Op. and Order, R.237, at pp.1-2.)

That is certainly not what the documents suggest on their face. In fact, it would be contrary to common experience to conclude that any FBI agent, let alone the head of the Cleveland FBI office, would draft a document addressed to the FBI Director himself that is "nothing more than conjecture" and "unsupported by investigation." This finding also is contrary to the fact that this mere "conjecture" persisted for perhaps as long as five years, as suggested in the documents themselves.

The court below violated fundamental principles of fairness and due process by reaching these conclusions without holding some type of in-court proceeding or without allowing for further discovery to develop the claims on each side. This is especially true where, as here, the issues are so fact intensive and so much is at stake. Because the court held no type of proceeding, it did not even see all of the withheld materials.

There was no reason for the court to accord unchallenged weight to any affidavits submitted by government witnesses. This is particularly so here because, as noted *supra* at pp.25-27, some of the sworn testimony appears to be contradicted by the contents of written documents that are now declassified.

The court below appears to have overlooked the fact that evidentiary hearings are precisely what was ordered in two of the cases cited in its opinion. For example, the court cited *Giles v. Maryland*, 386 U.S. 66, 98 (1967), for the proposition that the prosecution has no obligation under *Brady* to make "a complete and detailed accounting to the defense of all police investigatory work or information that is preliminary, challenged or speculative." (Memo. Op. and Order, R.237, at p.17.)

First, there was no opinion of the Court in *Giles*, but merely a judgment due to the absence of a majority of justices on a single opinion. The district court cited an opinion by Justice Fortas who concurred in the judgment. Second, the judgment was to reverse a state court of appeals order that reversed a trial court's decision to allow for a new trial because of two improperly withheld police reports. And even the trial court held an evidentiary hearing on the issue before deciding. Justice Fortas also observed that *Giles* was not a case where the state was being asked to produce preliminary, challenged, or speculative information. Rather, the petitioners there were on trial for their lives — suggesting that in cases like Mr. Demjanjuk's, special care by the government should be taken in producing rather than withholding materials.

Justice Brennan, who announced the judgment of the Court and wrote an opinion that the Chief Justice and Justice Douglas joined, observed, "There can be little doubt that the defense might have made effective use of the report at the trial or

in obtaining further evidence." *Giles*, 386 U.S. at 74. Again, the parallels to this appeal are noteworthy.

The court below also cited *United States v. Peltier*, 553 F. Supp. 890, 899 (D.N.D. 1982), but there, too, the appellate court remanded the matter and ordered an evidentiary hearing. The discovery at issue there consisted of documents the defendant obtained through a FOIA request about the investigation of the case against him. The Court of Appeals ordered the district court to hold an evidentiary hearing on a certain FBI teletype before determining whether a *Brady* violation occurred. The contents of the teletype appeared to contradict considerable evidence to the contrary. "We think it inappropriate . . . to simply assume this resolution of the new discrepancy raised by the October 2 teletype without hard evidence one way or the other." *United States v. Peltier*, 731 F.2d 550, 554 (8th Cir. 1984).

The point we make is a simple one: a matter this complex and so fact intensive should not have been decided without some type of in-court proceeding so that additional discovery could be conducted, testimony taken, and the documents and testimony already before the court be subjected to the rigors of cross-examination. Without that, the advocacy process so critical to a case so important and so lengthy as this one cannot run its proper course. Not to do these things also lessens the overall trust one can place in the final adjudication.

CONCLUSION

"[T]he right to acquire American citizenship is a precious one and that once citizenship has been acquired, its loss can have severe and unsettling consequences." *Fedorenko v. United States*, 449 U.S. 490, 505 (1981). The government "carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship." *Costello v. United States*, 365 U.S. 265, 269 (1961). The Supreme Court requires the government to justify the revocation of citizenship by "'clear, unequivocal, and convincing'" proof that does not leave "'the issue in doubt.'" *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (quoting *Maxwell Land-Grant Case*, 121 U.S. 325, 381 (1887)). Therefore, ***anything*** that would cast doubt onto the legitimacy of the government's case against a naturalized citizen should be highly relevant and material.

This Court's finding that OSI committed fraud on the court resulted in the first denaturalization order against Mr. Demjanjuk being vacated. This Court's message to OSI could not have been any clearer. Yet even as this Court was issuing its opinion, individuals in the largest investigative arm of our Department of Justice had in their file cabinets classified and non-classified documents relevant and material to the case against John Demjanjuk. In those documents, federal agents questioned the very item of evidence about which this Court was holding hearings and writing

opinions. And yet no one from the government shared that evidence with anyone on the defense team or on this Bench. Those documents were not even divulged when the case returned to the district court to be readjudicated. Notwithstanding promises to the contrary, the government did the same thing it had just been reprimanded for.

Accordingly, for the reasons set forth above, the appellant requests this Court to vacate the final judgment by which John Demjanjuk was denaturalized a second time, and to order that his citizenship be restored posthumously. In the alternative, the appellant requests that the district court's decision below be reversed and this matter be remanded for further evidentiary proceedings.

Respectfully submitted,

/s/ Michael T. Tigar
Michael E. Tigar.
P.O. Box 528
Oriental, North Carolina 28571
(202) 549-4229
metigar@gmail.com

/s/ Dennis G. Terez
Dennis G. Terez
Vicki Werneke
Office of the Federal Public Defender
1660 W. 2nd Street, Suite 750
Cleveland, Ohio 44113-1454
(216) 522-4856 (t)
(216) 522-4321 (f)
dennis_terez@fd.org

vicki_werneke@fd.org

Attorneys for Vera Demjanjuk, as Executrix of the Estate of John Demjanjuk

April 12, 2012

CERTIFICATE OF COMPLIANCE

I hereby certify that the above brief, excluding the cover page, table of contents, the table of authorities, the certificate of service, and the certificate of compliance, is comprised of 12,587 words and 1,242 proportionally spaced lines, and, therefore, complies with Fed R. App. P. 32(a)(7)(B).

/s/ Dennis G. Terez
Dennis G. Terez
Office of the Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that the Brief of Appellant was filed on this 12th day of April, 2012 using the Court's ECF system, which will send a notice of this filing to all counsel of record indicated on the electronic receipt.

/s/ Dennis G. Terez
Dennis G. Terez
Office of the Federal Public Defender

APPELLANT'S DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

The appellant, pursuant to Sixth Circuit Rule 30(b), hereby designates the following filings in the district court's electronic record and hard copy record in this case:

Record Number	Description
212	Motion for Reappointment
213	Response to Motion for Reappointment
215	Memorandum of Opinion and Order
219	Motion Pursuant to Rule 60
222	Memorandum in Support of Rule 60 Motion
223	Exhibit A to Memorandum in Support of Rule 60 Motion
229	Response to Rule 60 Motion
232	Reply in Support of Rule 60 Motion
237	Memorandum Opinion and Order
238	Motion for Reconsideration of Memorandum Opinion and Order
239	Opposition to Motion for Reconsideration
240	Reply in Support of Motion for Reconsideration
241	Memorandum Opinion and Order
242	Notice of Appeal

ADDENDUM A